merely what interest is necessary in the litigant to warrant an application to the local court.[21] Although the tendency in New York to except cases of the nature of the one under discussion, having negligence as the gravamen of the action,[22] from the rule governing actions for direct injuries to land,[23] is a salutary one, the distinction is hardly warranted by the cases, even in New York,[24] for here too the determination of title may be necessitated.[25] Since however there is no essential lack of jurisdiction in the courts with respect to such actions, it would seem preferable where, as in this case, the proper interest appears in the plaintiff, for the New York Courts to take cognizance of actions for injuries to real property lying beyond its borders, rather than to unnecessarily force a resident to pursue the wrongdoer beyond the jurisdiction.[26]

THE UNAUTHORIZED ISSUE OF CORPORATE STOCK.—The rights and liabilities arising from an over-issue of corporate stock are primarily determinable from a consideration of the nature of a corporation.[1] The conception that a corporation is a being of such limited powers that any attempt to transgress the boundaries set by its charter is necessarily a nullity, and the more generally accepted doctrine that as the corporation is a creature of law, any exercise of power in excess of the statutory authorization is impliedly prohibited and consequently illegal, are both products of the period when the privilege of assuming corporate powers was a special franchise. Although these theories are logically defensible, their application demonstrates that their failure to give proper recognition to the correlation of interests of State, stockholders, and creditors, often causes manifest injustice. As neither the State[2] nor the stockholders[3] unaided by the other can bring a corporation into being,[4] the powers of an entity organized through the concurrence of both are not traceable

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[21]Robinson *v.* Oceanic Steam. Nav. Co. (1889) 112 N. Y. 215; Anglo-Am. Prov. Co. *v.* Davis Prov. Co. *supra.*

[22]Barney *v.* Burstenbinder *supra;* Home Insurance Co. *v.* Penna. R. R. Co. (N. Y. 1877) 11 Hun 182.

[23]Mott *v.* Coddington (N. Y. 1863) 1 Abb. Pr. [N. S.] 290; American etc. Tel. Co. *v.* Middleton *supra;* Cragin *v.* Lovell *supra;* Dodge *v.* Colby *supra;* Hurd *v.* Miller (N. Y. 1859) 2 Hilt. 540; DeCourcy *v.* Stewart (N. Y. 1880) 20 Hun 561; Huenermund *v.* Erie Ry. Co. (N. Y. 1874) 48 How. Pr. 55; see Sprague Nat. Bank *v.* Erie R. R. Co. (N. Y. 1899) 40 App. Div. 69; Watts *v.* Kinney (N. Y. 1843) 6 Hill 82.

[24]Mott *v.* Coddington *supra;* Cragin *v.* Lovell *supra;* see cases cited in note 2.

[25]Brereton *v.* Canadian Pac. Ry. Co. *supra.*

[26]See Grant *v.* Cananea Copper Co. *supra.*

[1]See 7 COLUMBIA LAW REVIEW 196; 5 COLUMBIA LAW REVIEW 235; 8 COLUMBIA LAW REVIEW 403; Machen, Corporate Personality, 24 Harv. L. Rev. 250.

[2]Kenosha R. & R. I. R. R. Co. *v.* Marsh (1863) 17 Wis. 13.

[3]See Stowe *v.* Flagg (1874) 72 Ill. 397; Morawetz, Private Corporations (2nd ed.) § 8.

[4]See Machen, Modern Law of Corporations §§ 31, 32 & 33; Morawetz, Private Corporations (2nd ed.) § 37; *cf.* Briscoe *v.* The Bank of the Commonwealth of Kentucky (1837) 11 Pet. 257.

wholly to either.[5] The State exempts the stockholders from individual liability for the torts and contracts incident to the common enterprise,[6] and in addition to the powers conferred on the company by the agreement of the stockholders,[7] grants the right to be recognized as an entity.[8] Justice would therefore seem to demand that every act of the officers of the corporation in its behalf should be considered lawful unless rendered illegal by express prohibition.[9] An unauthorized act would, however, be subject to attack by a stockholder as a breach of the original agreement,[10] but unless set aside or enjoined as a consequence of such attack would be binding upon both the corporation and the third party.[11] Thus an over-issue of stock, if consented to by all the stockholders, would be valid, although the corporation would be liable to a forfeiture of its charter were the increase of the capital deemed harmful to the public interest.[12] The purchasers would become stockholders in the corporation with the same rights and privileges, and subject to the same obligations and liabilities as the original subscribers, and a creditor who dealt with the corporation in reliance upon a capital apparently adequate would find a real instead of a fictitious fund from which he might obtain satisfaction of his claim. While the view that an unauthorized act is valid, except in so far as it injuriously affects the interest of a dissenting stockholder, has been accorded some judicial recognition in connection with many acts conceived to be beyond the power of a corporation,[13] it has never been accepted where the issue of unauthorized capital was involved.[14] Wherever this question has arisen the courts have assumed, rather than decided, that an increase of capital was beyond the power of the corporation and that the stock was void, whether

[5]See Memphis Branch Ry. Co. *v.* Sullivan (1876) 57 Ga. 240; Hartford & N. H. R. R. R. Co. *v.* Croswell (N. Y. 1843) 5 Hill 383; Kenosha R. & R. I. R. R. Co. *v* Marsh *supra;* Machen, Modern Law of Corporations §§ 31, 32, 33.

[6]Cook, Corporations (6th ed.) §§ 212, 213.

[7]See Ellerman *v.* Chi. Junction Ry. etc. Co. (1891) 49 N. J. Eq. 217; Bixler *v.* Summerfield (1902) 195 Ill. 147; Bent *v.* Underdown (1900) 156 Ind. 516.

[8]Briscoe *v.* The Bank of the Commonwealth of Kentucky *supra;* Button *v.* Hoffman (1884) 61 Wis. 20; Gallagher *v.* Germania Brewing Co. (1893) 53 Minn. 214; see Ellerman *v.* Chi. Junction Ry. Co. *supra.*

[9]Whitney *v.* Wyman (1879) 101 U. S. 392; see Vought *v.* Eastern B. & L. Ass'n. (1902) 172 N. Y. 508; Eastern B. & L. Ass'n. *v.* Williamson (1902) 189 U. S. 122.

[10]Railway *v.* Allerton (1873) 13 Wall. 233; Kent *v.* Quicksilver Mining Co. (1879) 78 N. Y. 159.

[11]Madison & Indianapolis R. R. Co. *v.* Norwich Savings Society (1865) 24 Ind. 457.

[12]The People *v.* Chicago Gas Trust Co. (1889) 130 Ill. 268; see Bixler *v.* Summerfield *supra.* The present tendency is not to declare a forfeiture merely because of the exercise by the corporation of assumed powers. See People *v.* North River etc. Co. (1890) 121 N. Y. 582.

[13]Madison & Indianapolis R. R. Co. *v.* Norwich Savings Society *supra.*

[14]Scovill *v.* Thayer (1881) 105 U. S., 143; N. Y. & N. H. R. R. Co. *v.* Schuyler (1865) 34 N. Y. 30; Mechanics Bank *v.* N. Y. & N. H. R. R. Co. (1856) 13 N. Y. 599.

issued fraudulently by an agent,[15] or *bona fide* at the command of all the stockholders.[16] As a fixed and unalterable capital is not inherently essential to an entity,[17] an increase of capital would seem on principle to be merely an unauthorized act and would be void only in a jurisdiction in which every unauthorized act is considered a non-corporate act.[18] A recognition of the validity of an over-issue would, however, logically be required in a jurisdiction in which a so-called *ultra vires* contract is enforceable when it has been so far executed by either party as to confer a benefit on the other.[19]

Assuming the stock to be void, it nevertheless does not follow that a purchaser has no remedy. The corporation, being an inanimate entity, can act only through an agent[20] and is responsible for the acts of its agent in any case in which a natural person occupying a similar position would be liable as a principal.[21] Recovery could therefore be enforced against the corporation whenever the purchaser has paid the consideration for the stock to an agent acting within his apparent authority.[22] In any case, the principal may be compelled to reimburse the purchaser to the extent of the benefit actually received.[23]

A problem requiring the application of these principles was recently presented to the Appellate Division of the New York Supreme Court in the case of *Higginbotham* v. *International Trust Co.* (1910) 126 N. Y. Supp. 366. The defendant trust company was incorporated under the laws of the State of New York requiring the full amount of the capital stock to be subscribed and paid in, before the company was authorized to commence business. The stock being fully subscribed but not wholly paid in, the defendant's president, one Maxwell, procured a transfer of $145,000 to the defendant's credit by charging that amount to the account of a depositor in a bank of which Maxwell was an officer, and thereupon filed the required affidavit with the Secretary of State. The plaintiff subsequently made a payment to Maxwell on an over-subscription for twenty-five shares of stock and was given a receipt therefor signed by Maxwell as president of the defendant trust company. This money was paid by Maxwell into the account of the depositor in the bank. The plaintiff having brought an action against the trust company for money had and received to

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[15]Allen *v.* South Boston Ry. Co. (1889) 150 Mass. 200; Titus *v.* President etc. G. W. Turnpike Road (1874) 61 N. Y. 237; Bruff *v.* Mali (1867) 36 N. Y. 200; N. Y. & N. H. R. R. Co. *v.* Schuyler *supra;* Mechanics Bank *v* N. Y. & N. H. R. R. Co. *supra.*

[16]Scovill *v.* Thayer *supra.*

[17]See Kent *v.* Quicksilver Mining Co. *supra.*

[18]See Boyd *v.* American Carbon Black Co. (1897) 182 Pa. St. 206.

[19]Bath Gas Light Co. *v.* Claffy (1896) 151 N. Y. 24; see Jemison *v.* Citizens' Bank of Jefferson (1890) 122 N. Y. 135; *cf.* Madison Ave. Baptist Church *v.* Baptist Church (1878) 73 N. Y. 82.

[20]Knowlton *v.* Congress & Empire Spring Co. (1874) 57 N. Y. 518, 528; Tome *v.* Parkersburg Branch R. R. Co. (1873) 39 Md. 36, 80.

[21]Merchants Bank *v.* State Bank (1870) 10 Wall. 604, 644.

[22]N. Y. & N. H. R. R. Co. *v.* Schuyler *supra;* Titus *v.* The President etc. G. W. Turnpike Road *supra; cf.* Mechanics Bank *v.* N. Y. & N. H. R. R. Co. *supra.*

[23]Reed *v.* Boston Machine Co. (1886) 141 Mass. 454; Scovill *v.* Thayer *supra;* but not if the parties are *in pari delicto.* Knowlton *v.* Congress & Empire Spring Co. *supra.*

recover the amount paid by him to Maxwell, the court, recognizing that the over-subscription was void, reached the conclusion (two justices dissenting) that as the defendant received the benefit of the plaintiff's payment, it was under a duty to refund the amount paid. As the basis of the recovery was the unjust enrichment of the defendant at the expense of the plaintiff,[24] it would seem from the facts that the benefit was too remote, and the opinion of the dissenting justices is therefore preferable.

BURDEN OF PROVING SURVIVORSHIP IN A COMMON DISASTER.—While the fact that one of several persons overtaken by a common disaster was the last to perish may of course be established by ordinary proof,[1] the difficulty is that from the very nature of such accidents, there is almost invariably an entire absence of evidence. The common law, deeming the relative order of death as unascertainable in law as it is in fact, has declined both to adopt the civil law presumptions of survivorship based upon age or sex, and to presume that death was simultaneous.[2] In view of this, any claimant who must establish the fact of survivorship as a condition precedent to his right to recover the property will be unable to do so, and only that party can succeed whose right is not dependent upon such a condition.[3] Because the practical result is, in nearly every case, that the property is disposed of as though the deaths had occurred at the same instant, it seems to have been thought that the rule which requires a party asserting predecease or survival to prove it, necessarily has the same effect as a presumption of synchronous death.[4] Yet it is erroneous to suppose that such a presumption and an entire absence of presumption are convertible expressions. If, for example, the non-survival of one of the persons who have perished is a condition precedent to the right of a legatee, the latter can recover the property if he can show either predecease or co-instantaneous death. Were the courts to presume death at the same moment, the legatee would have a *prima facie* right to the property which his opponent could not rebut. Since, however, there is no presumption to aid the legatee, he will be unable to show the happening of either of the conditions upon which his claim depends, and must consequently fail.[5]

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[24]Lockwood *v.* Kelsea (1860) 41 N. H. 185.

[1]Smith *v.* Croom (1857) 7 Fla. 81.

[2]Underwood *v.* Wing (1854) 19 Beav. 459; affirmed (1855) 4 DeG. M. & G. 633; Wing *v.* Angrave (1860) 8 H. L. C. 183; Newell *v.* Nichols (N. Y. 1878) 12 Hun 604; affirmed (1878) 75 N. Y. 73; Johnson *v.* Merrithew (1888) 80 Me. 111. Before the crystallization of this rule of law there had been cases holding that the law would presume the co-instantaneous death of the party, Taylor *v.* Diplock (1815) 2 Phillim. Ecc. 261, or that, as in the civil law, arbitrary presumptions of survivorship would be entertained. Sillick *v.* Booth (1841) 1 W. & C. Ch. Cas. 117.

[3]Cowman *v.* Rogers (1891) 73 Md. 403; Coye *v.* Leach (Mass. 1844) 8 Met. 371; Hildenbrandt *v.* Ames (1901) 27 Tex. Civ. App. 377; Wing *v.* Angrave *supra;* Newell *v.* Nichols *supra;* Johnson *v.* Merrithew *supra.*

[4]Supreme Council *v.* Kacer (1902) 96 Mo. App. 93; Walton & Co. *v.* Burchel (Tenn. 1907) 121 S. W. 391; Balder *v.* Middeke (1900) 92 Ill. App. 227.

[5]Furthermore, as has been pointed out, 16 Green Bag 237, 238, a different result would have been reached in certain of the adjudged cases had the court been able to say that such a presumption exists. Hartshorne *v.* Wilkins (N. Sc. 1856) 6 Old. 276.